1952. **File No.** O. Represent. of people/52

Legal Deptt.

A **BRANCH**

Subject:— Opinions under the Representation of People Act 1950

P = 57/E

File No. O. Representation of People /52

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C O N T E N T S.

Legal Department File No. O.Representation of People/52.

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AS 4/7

Rele.MS. 27/6.

C O N T E N T S.

Legal Department File No. O.Representation of People/52.

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Rele.M.S.
28/6/56.

Legal Department.

The District Superintendent of Police, Surat, proposes that Government should issue an order under Rule 52 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, directing the Returning Officer of the Constituency to allow him to inspect the marked copy of the Electoral Roll and the bundles of valid and rejected votes. It appears that this proposal will not be legally feasible. Sub-rule (1) of Rule 52 provides that while in the custody of the Returning Officer the packets of the ballot papers, whether valid, rejected or tendered, of the counterfoils of postal ballot papers and of the marked copy of the electoral roll shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent Court or of a Tribunal. Obviously, Government has no power to issue any direction to the Returning Officer as proposed.

The next question is which court can be deemed to be the competent court under Rule 52 and which court can take cognisance of the cases mentioned in section 137(2).

Section 136(1)(f) of the Representation of the People Act, 1951, provides that a person shall be guilty of an electoral offence if at any election he without due authority destroys, takes, opens or otherwise interferes with any ballot box or ballot papers then in use for the purposes of the election. Clause (a) of sub-section (2) of

that section provides that any person guilty of an electoral offence under this section shall, if he is a Returning Officer or an Assistant Returning Officer or a Presiding Officer at a polling station or any other officer or clerk employed on official duty in connection with the election, be punishable with imprisonment for a term which may extend to two years or with fine or with both, and under clause (b), if he is any other person, be punishable with imprisonment for a term which may extend to six months or with fine or with both. Sub-section (4) provides that an offence punishable under clause (b) of sub-section (2) shall be cognizable. Under sub-section (1) of section 137, if the Election Commission or a Regional Commissioner appointed under clause (4) of article 324 or the Chief Electoral Officer of the State has reason to believe that any offence punishable under section 129, or under section 134 or under clause (a) of sub-section (2) of section 136 has been committed in reference to any election within a State, it shall be the duty of the Election Commission, the Regional Commissioner or the Chief Electoral Officer, as the case may be, to cause such inquiries to be made and such prosecutions to be instituted as the circumstances of the case may appear to it or him to require. Sub-section (2) provides that no court shall take cognisance of any offence punishable under section 129 or under section 134 or under clause (a) of sub-section (2) of section 136 unless there is a complaint made by

order of, or under authority from, the Election Commission or a Regional Commissioner appointed under clause (4) of article 324 or the Chief Electoral Officer of the State concerned. It is clear from these provisions that an inquiry into an offence falling under section 136(2)(a) can be initiated only when the Election Comission, the Regional commissioner or the Chief Electoral Officer require it to be made and the court shall take congnizance of the offence under that provision only when a complaint is made by order of or under authority from the Election Commission or the Regional Commissioner or the Chief Electoral Officer of the State concerned.

Rule 52(1) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, provides :

> "While in the custody of the Returning Officer the packets of ballot papers, whether valid, rejected or tendered, of the counter-foils of postal ballot papers and of the marked copy of the electoral roll shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent court or of a Tribunal."

It is apparent from this provision that unless there is an order of a competent court or of a Tribunal, the Returning Officer cannot allow the inspection of the marked copy of the electoral roll and bundles of valid and rejected votes, nor would he be entitled to produce them before any authority. "Competent court" means a court

which has got the power to order inspection or production of the electoral roll and the bundles of valid and rejected votes. Under section 94(1) of the Criminal Procedure Code a court, if it considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such court, may issue a summons to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it at the time and place stated in the summons. In Re Hirilal (22 Bombay 949) it was held that if there were no proceedings pending before a magistrate, it was not a court within the meaning of this section and could not issue an order under section 94 or 96, but the Privy Council in the case of Clarke v. Brojendra Kishore (39 Calcutta 953 P.C. at p. 966) has laid down that the words "court" and "magistrate" are convertible terms and that Schedule V, Form 8 contemplates the issue of a search warrant before any proceedings are initited and in view of an inquiry to be made. In Laxmidas (5 B.L.R.980) it was held that before the magistrate can order for the production of any document, he must judicially consider whether the production of the document is necessary or relevant for the purposes of the trial. In Nizam of Hyderabad v. Jacob (19 Calcutta 52) it was held that the

document or thing called for must have some relation or connection with the subject-matter of the investigation or the inquiry or throw some light on the proceeding or some link in the chain of evidence. Reading section 94 of the Criminal Procedure Code with the provisions of section 137 of the Representation of the People Act, it appears that there should be first a direction from the Election Commission, the Regional Commissioner or the Chief Electoral ~~Commissioner, the Regional Commissioner or the Chief Electoral~~ Officer for inquiry to be made and prosecution to be instituted and thereafter a complaint should be filed in a competent court, that is to say, a court which will have jurisdiction to try the offence, and that court can issue an order under section 94 of the Criminal Procedure Code for the production and inspection of the marked copy of the electoral roll and the bundles of valid and rejected votes.

Id/-

24/1.

Additional Secretary to Government.

U.R. to P. & S.D. No. 102-Conf1. dated the 24th January, 1952.

MSR.
26/6.

Legal Department.

The question for consideration is whether the members of Parliament and the State Legislature would incur disqualification to be such members by reason of their appointment as non-official members of the Road Transport Corporation constituted under the Road Transport Corporation Act, 1950. Section 7(e) of the Representation of the People Act, 1951, lays down that a person shall be disqualified for being chosen as and for being a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a Stte if he is a director, managing agent or holds any office of profit under any Corporation in which the appropriate (i.e., Central or State) Government has any financial interest. Under section 28 of the Road Transport Corporation Act, 1950, the Central Government and a State Government may provide to a Corporation established by a State Government capital that may be required by the Corporation for the purpose of carrying on its undertaking. So far as the Bombay Road Transport Corporation is concerned, its capital has been contributed by the State Government under para. 22 of the Government Notification (H.D.) No. 1780/5 dated the 16th November 1949. It is presumed that after reconstitution of the Corporation under section 5 of the Road Transport Corporations Act, 1950, such capital would be contributed either wholly or partially by the State Government. The State Government therefore has and will have financial interest in the Corporation.

2. The question, however, is whether a member of the Corporation appointed under section 5 of the Act will be disqualified to be or to continue as a member of the Central or State Legislature by reason of his appointment as a member of the Corporation. Section 7(e) of the Representation of the People Act, 1951, refers to a director, a managing agent or a person who holds an office of profit under a Corporation. The saving in section 8(e) provides that a person shall not be disqualified under section 7(e) by reason of his being a director unless the office of such director is declared by a law made by Parliament to so disqualify its holder. The expressions 'director' and 'managing agent' are well known expressions under the Company Law and are presumably used in sections 7 and 8 in reference to companies. They cannot be applied to any other corporation, which is not a company, although it may be a trading concern. In the case of such corporation any person who holds an office of profit would be disqualified to be a member of a ~~member of a~~ Legislature under section 7(e) of the Representation of the People Act, 1951. The said Act does not define the expression "office of profit" as used in section 7. As stated by Finlay J. in Henry v. Galloway (1933) 148 L.T. 463 at p. 465, office of profit is not a thing particularly easy to define. It is of course and must be an office to which remuneration is in some way or other attached. In the absence of any

provision to that effect in the Representation of the People Act, 1951, the meaning of the expression will have to be gathered from the provisions of the enactment constituting any particular corporation. Thus, under the Indian Companies Act, 1913, it is clear from the provisions of section 86-I that a director is not the holder of office of profit. Clause (e) of sub-section (1) of that section provides that the office of a director shall be vacated if he accepts an office of profit under the company. Directors are not entitled as of right to any remuneration (In re George Newman & Co. (1895) 1 Ch. 674), unless the articles provide for it. The emoluments paid to directors in accordance with the Articles of Association do not disqualify them for continuing as the directors of a company. If, however, such director receives emoluments in addition to those which he receives as a director, he incurs disqualification. (Astley v. New Tivoli Ltd. (1899) 1 Ch. 151 at p. 155). So far as a Corporation under the Road Transport Corporations Act, 1950, is concerned, it is not a company, though it may be a trading corporation.

3. The Chairman ~~and~~ and the members of the Corporation appointed under section 6 of the Road Transport Corporations Act, 1950, cannot be held to be directors of the Corporation within the meaning of section 7(e) of the Representation of the People Act, 1951. The question will be whether they are the holders of office of profit under the Corporation. It is true that section 6 of the Road Transport Corporations Act, 1950, which

relates to disqualifications for being chosen as or being a member of the Corporation does not provide that a member of a legislature, either Central or State, is disqualified for being a member of the Corporation as the English Road Transport Act of 1947 does (See section 1(4)). Section 44(2)(b) of the Indian Act provides that rules can be made to provide for the remuneration, fees and allowances of the members of the Corporation. Rules under this section have been drafted for the Bombay State Road Transport Corporation, and Rule 5 of these draft rules provides that a non-official member of the Corporation shall work in an honorary capacity, but he shall be entitled to an attendance fee. It is true that section 44(2)(b) draws a distinction between remuneration and fees. But both will be held to be "profits", unless it is made clear that such emoluments are not intended to be a source of profits to the holder. In the absence of an express provision in the Road Transport Corporation-s Act, 1950, the proper test to distinguish emoluments which are a source of profit and those which are not, would be the test followed in the Income Tax Law in defining income which is chargeable to tax. Under section 4(3)(vi) of the Indian Income Tax Act, 1922, it is provided that income will not include any special allowance, benefit or perquisite specifically granted to meet expenses wholly and necessarily incurred in the performance of the duties of an office. A travelling allowance will fall under this head,

but it is doubtful whether an attendance fee will necessarily be considered to be an allowance granted to a member to meet expenses wholly and necessarily incurred in the performance of the duties of the office. If therefore the intention of Government is to enable the members of the Legislature to be appointed as non-official members of the Corporation, it would be necessary to make it clear in the rules to be made under section 44(2)(b) of the Road Transport Corporation Act, 1950, that they shall be entitled to an allowance for travelling and incidental expenses which they may incurr in the performance of their duties as members. If such a rule is made it may be possible to hold that the non-official members of the Corporation do not hold office of profit under the Corporation.

4. As the point is of importance, the Advocate General is requested to give his opinion.

Id/-

4/2.

Additional Secretary to Government.

U.R. to Advocate General, No. 144-Confl., dated the 5th February 1952.

MSR.
26/6.

CONFIDENTIAL

No. 1 of 1952 11th February, 1952.

U.R. TO ADVOCATE GENERAL NO. 144-CONFL. DATED 8TH FEB., 52.

I am of opinion that Section 7 of the Representation of the People Act, 1951, inter alia, provides that a person shall be disqualified to be chosen and for being a member of either House of the People or of the Legislative Assembly or Legislative Council of the State if he is a director or a Managing Agent or holds any office of profit under any corporation in which the appropriate Government has any share or financial interest.

The capital of the Road Transport Corporation constituted under para 22 of the Government Notification (H.D.) No.1780-5 dated 16th November, 1949 has been contributed by the State Government. Even after the reconstitution of the corporation under the 1950 Act such capital would be contributed by the State Government. Therefore in such a corporation the State Government has a financial interest.

If the non-official member of such a corporation is given attendance fees he will be regarded as holding an office of profit under the corporation in which the State Government has financial interest. If the rules framed under S.42(2)(b) provide for payment only of

allowance for travelling and incidental expenses necessary to be incurred in performance of the duties as members, such non-official members of the corporation cannot be regarded as holding office of profit under the corporation and will not be disqualified under S.7(e) of the Representation of the People Act, 1951.

Sd/- M.P. AMIN.

THE ADVOCATE GENERAL OF BOMBAY.

MBR.
26/6.

Legal Department.

A copy of the opinion of the Advocate General who was consulted in the matter is sent herewith along with a statement of the case.

Id/-
14/2.
Additional Secretary to Government.

U.R. to H.D., No. 182-Confl., dated the 16th February 1952.

MSR.
26/6.

Office of the R.L.A.

The short question for consideration is whether the persons who are elected as councillors under section 17 of the Bombay Municipal Boroughs Act, 1925, but who have not entered upon their office in accordance with section 25(2)(a) of the Act can be held to be "members" for the purpose of section 27(2) of the Representation of the People Act, 1950.

2. This question must naturally be decided, not on arguments by analogy but upon the wordings actually used in the Act. Section 29 of the Act contemplates that a person who is elected or nominated to be a councillor may not accept office. The term of office of the newly elected councillors is deemed to commence on the date of the first general meeting which shall be held after such election section 25(2)(a); and the term of office of the outgoing councillors shall be deemed to extend to and expire with the day before the date of such meeting (section 25(2)(b)). It is, therefore, apparent that in the interval between the publication of the names of the elected councillors under section 17 and the holding of the first general meeting, we have two distinct sets of persons - councillors holding office, and persons who are merely elected as councillors but who have not entered upon office. If the qualifying date for the preparation of the rolls were to fall during this interval, it could not possibly be

maintained that the latter set should be on the roll in preference to the former. It is the former set who can be truly described as members. By "member" in this context is, therefore, meant not a person who is merely elected as a councillor but a person who has actually entered upon and is holding the office of a councillor. This interpretation does not result in any disenfranchisement; for the successor set of councillors can be put on the revised roll for purposes of the next election.

3. That being the normal interpretation, the mere fact that in this particular instance there were no councillors holding office because of the antecedent supersession of the Municipality would not entitle the persons who have not entered upon their office to be put on the roll. The result of disenfranchisement is more apparent than real, and is only with reference to the present general elections; and that result would have been otherwise ensued had the supersession itself been continued beyond the qulifying date.

Id/-

19/2.

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 2705, dated the 19th February 1952.

MSR.
26/6.

Office of the R.L.A.

Shri Pratap Budhaji Kandare sons of Budha Motiram Kandare was nominated as a Scheduled Caste candidate from a Constituency in the East Khandesh by means of two nomination papers dated the 23rd November 1951 (pages 1 to 5 in file No.4 The proposer and the seconder in the first nomination paper were Shri Mahajan and Shri Mule respectively, and the proposer and the seconder in the second nomination paper were Shri Moinoddin Sheikh and Shri Yusuf Sheikh respectively. In these nomination papers the age of Shri Kandare is stated to be '26'. The scrutiny of the nomination papers took place on 27-11-1951 when an objection was raised by another candidate -- Shri H.I. Kalyani -- that the age given in the nomination papers of Shri Kandare was false and that in truth he was less than 25 years and was as such not qualified to stand as a candidate to the State Legislature in view of Article 173(b) of the Constitution of India. On the evidence before him the Returning Officer upheld that objection and rejected the nomination of Shri Kandare by an order dated the 29th November 1951. Then Shri Kalyani wrote to the District Magistrate, East Khandesh, that Shri Kandare had deliberately made a false declaration in regard to his age and in doing so received active support from one Devaki Nandan Narayan, President of the District Congress Committee, who had used his influence over some of the Government officers to falsify the age of Shri Kandare. The District Magistrate has, after a

detailed enquiry, submitted his report in which he proposes that Shri Kandare should be prosecuted f for offences under sections 191 and 182 of the Indian Penal Code. The Chief Election Officer, however, proposes the prosecution of both Shri Kandare and Shri Devaki Nandan and at the same time requests the R.L.A. to advise whether in respect of the offences disclosed the Election Tribunal alone would have jurisdiction.

2. Assuming that the statement of age of Shri Kandare made in the nomination papers was false and was so made deliberatly w-ith a view to mislead the Returning Officer, that does not amount to any electoral offence and is not punishable under any of the provisions of the Representation of People Act, 1951 (India XLIII of 1951). Therefore the question of the Election Tribunal alone having jurisdiction does not arise. The only other question that remins is whether any offence undef the Indian Penal Code has been disclosed.

3. The relevant provisions of the Indian Penal Code are section 191 and section 182. In fact, in a foot-note to the nomination paper it has been stated that if any person makes a false declaration or gives information which he knows or believes to be false etc., he shall be liable to be punished under section 191 and/or section 182 of the Indian Penal Code. In the present case, however, none of these two sections applies so xf far as Shri Kandare is concerned. Shri Kandare has not made any false declaration as to age before the Returning Officer; the only-declarations made by him in the Nomination

paper are regarding the acceptance of nomination, the appointment of an agent and the fact that he belongs to the Bhangi Community (which is a community of untouchables). The information as to age given in the Nomination Papers is not, on the face of it, given by Shri Kandare but, given by the proposers and seconders of Shri Kandare. This is as it should be because under section 33(1) of the Representation of People Act, 1951, it is the proposer and the seconder who nominate and the candidate nominated only assents to the nomination. Prima facie, therefore, no offence under section 191 or section 182 of the Indian Penal Code is disclosed against Shri Kandare.

4. Whether an offence is disclosed against any of the other persons who gave information as to the alleged false age of Shri Kandare and against Shri Kandare as an abettor d epends upon the question whether the information about the age was really false. On that point the evidence which goes to suggest that the information was false boils down in the ultimate analysis to,-

(1) the fact that Shri Kandare's age is given in the School Register as 5/5/1927: and further the same date is given in the College Register and in the application made by Shri Kandare at the time of applying for service; but these naturally follow the school register;

(2) the fact that in the Vaccination Register of the Jalgaon Municipality Shri Pratap

Budha Motiram Bhangi (who is the same as the present "Shri Pratap B Kandare") was shown to be about 4 months of age when he was vaccinated on 27-5-1927;

These two facts are inconsistent because, if Shri Kandare was born on 5-5-1927 he could not have been s tated to be four months old by the Vaccinator only 22 days after his birth. But that apart, the two documents together would place Kandare's birth not later than 5-5-1927 and not earlier than 27-1-1927. As against this, Shri Kandare's case is tht he was born on 16-11-1926 and in support of thi he has put in an affidavit of his mother to that effect. The mother is the proper person to know the birth of her child and could be disbelieved only for valid reasons. The only reasons on which she could be disbelieved are the two facts stated above. But it will be seen that those two facts are not only inconsistent between themselves, but, at any rate, leave a margin of about 4 months in the birth dates. It is possible that this margin may be more than 4 months. The mother of Shri Kandare, in her affidavit, has stated that he was vaccinated about 6 or 7 months after he was born. That statement of hers may be true; for, according to the Police enquiries no birth of a child to Budha Motiram Bhangi has been shown in the birth register of the Jalgaon Municipality during the months of January to May 1927. The Police appear to connect Shri Pratap Budha Kandare with an entry in the birth register relating to a son (whose name is not mentioned) who is shown to have been born to one Budha Mangal on

23-1-1927. There is, however, nothing to show that Budha Mangal was the same as Budha Motiram. As a matter of fact, in respect of other children born to Budha Moti his name is correctly shown as 'Budha Moti'. Even in respect of the vaccination certificates of his children his name is shown as 'Budha Moti'. It is true that in the vaccination certificate of Pratap Budha it is stated that the child was born about 4 months earlier, but that statement must be taken to be approximate. It is on record that an earlier child named Kasturia was born to Budha Moti on 29-1-23 and was vaccinated about 14 months later i.e. on 11-3-24, but in the Vaccination Certificate the age of that child is shown as '12 months' thereby showing that the age given in the vaccination certificate is not necessarily exact. On these facts there are reasonable grounds to believe that Shri Kandare was born before 1927 and may have been born on 16-11-1926. That being so, it cannot be said that the information given in the nomination papers was false, much less that it was known or believed to be false.

In the circumstances, no prima facie case for a prosecution of Shri Kandare has been made out under sections 191 and 182 of the Indian Penal Code, much less is there evidence against Devakinandan. Beyond the fact that he approached two Magistrates and suggested that a domicile certificate should be granted to Shri Kandare,

there is no evidence to prove that he abetted the commission of an offence under section 191 or section 182 of the Indian Penal Code.

Id/-

28/12.

Remembrancer of Legal Affairs.

U.R. to Chief Secretary No. 1086-Confl.,

dated 29th Decr. 1951.

(See further opinion No. 9427 dt. 6.6.52.)

MSR.
26/6.

Office of the B.L.A.

The Advocate General has already expressed the opinion that if the Rules framed under section 42(2)(b) provide for payment only of allowance for travelling and incidental expenses necessary to be incurred in performance of the duties as members, such non-official members of the Corporation cannot be regrded as holding office of profit under the Corporation and will not be disqualified under section 7(c) of the Representation of the People Act, 1951. It follows, therefore, that the payment of allowance to be made to such members must not unreasonably exceed the expenses of travelling and expenses incidental thereto, lest the objection may be raised that under cover of allowance profit is actually being made. It would, therefore, be desirable to adopt a reasonable standard. For Government servants and also for members of the Legislature the standard of 1½ times the fare has been adopted, the understanding being that the extra half is intended to cover the expenses incidental to travelling. That standard, however, takes into account the fact that the Government servant or the member concerned is also in receipt of a salary. Having regard to this consideration the standard of two first class fares would not be regarded as unreasonable. Similarly, the daily allowance of Rs. 20/- would not also be reggrded as unreasonable having regard to the cost of living in Bombay. Although the Members of the

Legislature may be in receipt of a salary as such members, a general standard on the above lines adopted for all non-official members, whether Members of the Legsislature or not, would not be regarded as objectionable.

Id/-

24/3.

Remembrancer of Legal Affairs.

U.R. to H.D. No. 287-Confl., dated the 24th March 1952.

MSR.
26/7.

Office of the R.L.A.

The questions raised for the consideration of the R.L.A. are : (1) whether the elected members of the Bombay Legislative Assembly called upon to attend poll at Bombay for the purpose of electing members to the Council of State and to the Bombay Legislative Council are to be deemed to be members of the Legislative Assembly; and (2) whether such members are entitled to be paid the travelling allowance in respect of the journey undertaken by them for the purpose of the said poll.

2. The subject-matter "Election to Parliament to the Legislature of States" falls under entry 72 in List I in the 7th Schedule to the Constitution of India. The Elections are being conducted under the supervision of the Election Commission which is an authority appointed by the Central Government. The poll referred to under the two notifications is in connection with the election to the Council of States and to the Bombay Legislative Council.This cannot be considered to be the business of the Legislature of a State which is not competent to transact any business on matters falling under List I.,It has been held by the R.L.A. in his note dated 11-1-52 that the meeting of the members of the Bombay Legislative Assembly which will be called upon to elect members of the Legislative Council is not the meeting of the Assembly, as the House of Legislature to be called under article 174 of

the Constitution, but if is a meeting of an Electoral College or body to be called by the Governor under section 16 of the Representation of the People Act, 1951, on the dates appointed by the Election Commission. The position has been accepted by Government that when a meeting of the elected members of the Legislative Assembly is called by the Returning Officer, the Members will meet only for the purpose of recording their votes for election of members to the Legislative Council and not for transacting any legislative business (vide Chief Secretary's note dated 14-1-52 endorsed by the H.C.M., at page 6 of L.D. file O.Mis Confl. 52/1). It may be pointed out that under rule 83 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, it is also provided that notwithstanding anything contained in the foregoing provisions of this Chapter the Election Commission may, at any time before the last date appointed under clause (c) of sub-section (2) of section 39 for the withdrawal of candidature of any election referred to in that sub-section, direct by notification in the Official Gazette that the method of voting by postal ballot shall be followed at such election. The reply to the first question is, therefore, in the negative.

3. As regards the second question, there is nothing in the Representation of the People Act, 1951, or rules thereunder to prevent the State Government from making any provision for the payment of travelling allowance to the elected members of the Assembly for the journey undertaken

by them for the purpose of the poll, referred to in the two notifications; nor can such members claim as of right the payment of such travelling allowance. The question whether such members should be paid, and if so, at what rate, is for the Administrative Department to decide.

4. The L.D. file referred to above may kindly be returned to this Department when no longer required.

Id/-
20/3.
Remembrancer of Legal Affairs.

MSR.
27/6.

Office of the R.L.A.

Petition of Shri Harilal Ramji - Representation of the People Act. 1951.

The petition which is alleged to contain defamatory statements has been addressed by Harilal Ramji one of the candidates for the Amreli constituency of the Bombay Legislative Assembly to the Returning Officer. The petition is dated 4th January 1952 i.e. the day after the election was held. It contains allegations against several presiding officers and also an allegation against the Collector of Amreli and Hon'ble Dr. Jivraj Mehta. The allegations against the presiding officers are to the effect that they interfered with the election agents of Harilal in several matters. The most serious allegation is that in some cases the presiding officers took ballot papers from electors and themselves put them in the ballot box of Dr. Jivraj Mehta. The allegation against the Collector is that he moved in his jeep with Hon'ble Dr. Jivraj Mehta who was one of the candidates on the polling day from one polling station to another. The petitioner alleges that thereby the conduct of the election was improperly influenced. The Collector urges that action should be taken against the petitioner by Government by instituting prosecution for defamation.

2. The Returning Officer in his report to the Chief Electoral Officer states that the petition is an attempt on the part of Harilal to create material and to prepare grounds for

a petition to the Election Tribunal for setting aside the election of Hon'ble Dr. Jivraj Mehta. It is not yet known whether Harilal has as yet filed an election petition. If he has done or does so and in his application to the Tribunal repeats the allegations which, on inquiry, have been found to be untrue, it would be open to the Tribunal to sanction his prosecution for the false statements made, if in the opinion of the Tribunal sufficient grounds exist for such prosecution. But it will not be expedient for Government to direct the Collector or the presiding officers to institute a prosecution for defamation at this stage, if according to the Returning Officer, the petition was made to create evidence for the institution of an election petition; for, any such action on the part of Government is liable to be misconstrued as an attempt to prevent Harilal from challenging the election of Hon'ble Dr. Jivraj Mehta.

2. Apart from the above question, it is very doubtful whether the petition will be held to contain sufficient material for a successful prosecution for defamation of presiding officers or the Collector. The petition was addressed to the Returning Officer who under section 24 of the Representation of the People Act, 1951, was in charge of the polling arrangements for election. The presiding officers were acting under his control. If, therefore, the petitioner reported any improper or irregular conduct of the presiding officers to the Returning Officer in connection with the polling, he would be protected

by the Eighth Exception tosection 499 of the Indian Penal Code, if he proves that he made the complaint in good faith. It is true that the Returning Officer has reported that the allegations are not true. The Returning Officer appears to have obtained the reports and statements of presiding officers and some rival candidates. Neither the petitioner nor any witness on his behalf appears to have been examined. The mere fact that the allegations are not found to be true on the evidence so recorded will not prevent the petitioner from proving that they were made in good faith.

3. So far as the allegaions regarding the Collector moving in a jeep with Hon'ble Dr. Jivraj Mehta is concerned, it is an allegation which, if proved, would amount to a major corrupt practice on the part of a candidate under section 128(8) of the Representation of the People Act, 1951. This allegation is thus directed more towards Hon'ble Dr. Jivraj Mehta who was the petitioner's rival candidates than the Collector. It does not appear that the Collector was one of the election officers. It is, however, true that as a Government servant any active assistance on his part to a candidate although such candidate was one of the Ministers would be considered to be improper and would have subjected him to disciplinary action at the hands of Government But that would not be a sufficient ground

for directing him to institute prosection for defamation. That allegation may afford sufficient ground to Hon'ble Dr. Jivraj Mehat to take action against Harilal.

4. In the circumstances of the present case, therefore, it does not appear that Government should direct either the Collector or any of the presiding officers to launch prosecutions for defamation.

Id/-
2/4/52.
Remembrancer of Legal Affairs.

U.R. to P. & S.D., No. 317-Confl., dated the 2nd April 1952.

MSR.
27/6.

Office of the R.L.A.

Section 138 of the Representation of the People Act, 1951, has amended section 196 and Schedule II of the Code of Criminal Procedure, 1898, with reference to the offence of personation. Personation at an election is made triable by the Presidency Magistrate or Magistrate of the first class. The Court of the Presidency Magistrate is therefore a competent court within the meaning of rule 52 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951. The documents in question can therefore be produced in that court.

MA/-

12/4.

Remembrancer of Legal Affairs.

U.R. to D.D. No. 5509, dated the

12th April 1952.

MBR.

OFFICE OF THE R.L.A.

By G.R., D.D.No.S.67 dated the 13th January 1950, Government has sanctioned a loan of Rs.4,00,000/- to Messrs. Glucose & Foods Ltd., Kurla. One of the conditions of the loan is that Government would appoint two nominees on the Board of Management of the Company. Accordingly, by G.R.,D.D.No.S.67 dated 10th May 1950, Government appointed Shri B.D. Deshmukh, Parliamentary Secretary, as one of its nominees on the Board of Management of the Company. On the eve of the general elections, Shri Deshmukh resigned on 9th November 1951 his appointment as Director of the Company. The question raised for consideration is whether the appointment of a Parliamentary Secretary by Government as a Director of the Company would disqualify him from continuing to be a member of the Legislature.

2. It is understood that Shri Deshmukh has been elected to the new Legislative Assembly. Section 7(e) of the Representation of the People Act, 1951 (XLIII of 1951) lays down that a person shall be disqualified for being a member of the Legislative Assembly if he is a director or manging agent of, or holds any office of profit under, any corporation in which Government has any share or financial interest. But section 8(e)

contains a saving provision which provides that, notwithstanding anything contained in section 7, a person shall not be disqualified under clause (e) of section 7 by reason of his being a director unless the office of such director is declared by Parliament by law to disqualify its holder. So far no law has been made by Parliament as contemplated by section 8(e). The Glucose & Foods, Ltd., is no doubt a Corporation in which the State Government has financial interest. Broadly speaking, a Director who does not receive any remuneration from the Company is not a holder of office of profit under the Company. It is presumed that the Government nominee on the Board of Directors of Messrs. Glucose & Foods,Ltd., does not receive any remineration from the Company except fees, if any, as a Director. If so, the appointment of a Parliamentary Secretary as a Director of the Company would not disqualify him from continuing to be a member of the State Legislature, in view of the saving provision contained in section 8(e) of the Representation of the People Act, 1951.

Id/-

1/5.

Remembrancer of Legal Affairs.

U.R. to D.D.No. 6942, dated the 2nd May 1952.

MSR.
27/6.

Legal Department.
13924/11-7-52.

Submitted with ref. to the P. & S.D. note on pp. 1-2 ante.

By G.Rs P. & S.D. No. 8055/46-H(2), dated the 20th October 1950 and No. 6987/46, dated the 18th Jan.1952 Govt. appointed certain officers as Revising Authorities for the disposal of claims and objections in respect of electoral rolls for the Assembly and Council constituencies, respectively. The question for the consideration of the R.L.A. is whether the appointments made under the said G.Rs. at the time of the preparation of the electoral rolls prepared for the General Elections would still continue for the purposes of the annual preparation of the electoral rolls.

Id/-
16/7/52.

A.S.

Legal Department.

In order not to leave any scope for argument and doubt it would be desirable ex majore Cautela to make the appointments of the revising authorities afresh in respect of both the Assembly and the Council Constituencies.

Id/-
21/7.
Additional Deputy Secretary to
Government.

U.R. to P. & S.D. No. 202-L, dated the
21st July 1952.

MSR.

Office of the R.L.A.

The Madras Act (XX of 1951 - The Madras Payment of Salaries and Removal of Disqualifications Act, 1951) provides in section 12 that every member of the Legislative Assembly and of the Legislative Council who does not hold any of the offices referred to in sections 3 to 6, such as the Chairman, Speaker, Minister etc., shall be entitled to receive travelling and daily allowance at such rates and upon such conditions as may be determined by rules made by the State Government. It also provides in sub-section (2) of the same section that the salary referred to in caluse (a) of sub-section (1) shall accrue to a member from the date on which he is declared duly elected, although a proviso is added that such salary shall not be paid until the member has made or subscribed the oath or affirmation referred to in article 188 of the Constitution. The Bombay enactments on the subject differ in both these respects. These enactments are : (1) The Bombay Legislature Members' Salaries and Allowances Act, 1937 (Bom. III of 1937), (2) The Bombay Legislature Members' Daily Allowance Act, 1950 (Bom.XXI of 1950) and (3) The Bombay Legislature Members' Travelling Allowance Act, 1950 (Bom.XLV of 1950) They provide that the travelling allowance is to be paid for the journey undertaken for the puppose of attending the session of the Assembly or the Council; or the meeting of a

committee of such Assembly or the Council; and similarly, that daily allowance is to be paid for each day of the period of residence for the purpose of attending the session of such Assembly or Council or the meeting of a committee etc. In Bom. III of 1937 there is no provision analogous to the Madras provision that the salary becomes payable from the date of the declaration of the election, which would mean that the salary becomes payable after the member has taken his seat upon taking oath; and that is why the word "member" in these enactments was construed to mean a member who has taken his seat. Any other view would mean that today we may have to pay a double set of salaries, which is clerly not the intention of the enactment. In my last opinion and in the papers referred to therein, it has already been made clear that the members who will now be coming to Bombay for the election purposes are not coming for attending a session. It is, therefore, obvious that, as they stand at present, the Bombay Acts do not permit payment to such members of travelling or daily allowance when they are called to Bombay for election purposes. In order to enable such payment being made, the Acts themselves will have to be amended on the lines of the Madras enactment, and that can be done at this stage only by an Ordinance. It would not seem advisable to resort to an Ordinance for this purpose. If the amendment is made hereafter by regular legislative process, that amendment will have to be made specifically retrospective in order to cover the payments which is is proposed

to make to members for their journeys in connection with the present election. Such retrospective legislation does not also seem expedient. In paragraph 3 of my opinion dated 20.3.1952 I had expressed the view that there was nothing in the Representation of the People Act, 1951, or the Rules thereunder to prevent the State Government from making any provision for the payment of travelling allowance to the elected members of the Assembly for the journey undertaken by them for the purposes of the poll. I do not know the grounds upon which the Election Commission or the Ministry of Law are inclined to think that such payment may be objectionable as a corrupt practice. At present I am not prepared to share that view, but it may be possible to give a definite opinion, if the Chief Electoral Officer can obtain copies of the opinion recorded by the Ministry of Law on this matter.

Id/-

25/3

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 4515, dated the

25th March 1952.

MSR.
27/6.

Legal Department.

Attention is invited to the draft Bill (copy attached) prepared in accordance with the suggestions received from the Administrative Departments concerned. The draft Bill amends the Schedule to the Bombay Legislature Members (Removal of Disqualifications) Act, 1951, by inserting therein entries 6 and 7. Entry 6 relates to the office of the Chairman and of the Members of Wage Boards constituted under the Bombay Industrial Relations Act, 1946. The Bill was placed before the Cabinet in July last when it was decided not to proceed with it for the present.

2. No specific entry has been included in the said Bill regarding members of the Housing Board. Legal position in their behalf appears to be as follows.

3. Under section 4(1) of the Bombay Housing Board Act, 1948, the Board is to consist of the Chairman and four other members appointed by the State Government. Under sub-section (2) of section 4 any member of the Board may at any time resign his office by submitting his resignation to the State Government. Section 7(2) provides that every member shall receive such allowances as may be prescribed. Section 7(4) provides that the allowances to the members shall be paid from the funds of the Board. Under section 54 (2) all expenditure which the State Government shall, not later than six months from the date of the establishment of the Board,

declare to have been incur-red on capital account in connection with the purposes of this Act shall be deemed to be a loan advanced to the Board on the date of such declaration. Section 55(2) provides that the Board may accept grants, subventions, donations and gifts from the Central or State Government for all or any of the purposes of this Act. Section 58 empowers the State Government to make subventions to the Board and to advance loan to it. Under section 66 the State Government has been authorised to make rules providing for allowances of members under section 7.

4. Rule 4 of the Bombay Housing Board Rules, 1949, provides that a member of the Board other than the Chairman shall be entitled to an allowance of Rs. 40/- every day of the meeting of the Board that he attends; and that he shall also be entitled to travelling allowance admissible to first class Government Official. A member of the Housing Board, therefore, holds an office of profit. Since, however, allowances, etc., are to be paid to him from the funds of the Board the office he holds cannot be s-aid to be an office under Government although his appointment is made by Government under section 4 of the Bombay Housing Board Act, 1948. Provisions of article 102(1)(a) or 191(1)(a) of the Constitution would not, therefore, be attracted in this case. It is true that in similar circumstances the Election Tribunal has, in election petition No. 23 of 1952, filed by Shrimati Hansa Mehta, held that an office of the Vice-Chancellor of the

Baroda University, the holder of which was appointed by Government but who drew allowances from the University funds, was an office of profit under Government and as such the holder thereof is disqualified for being chosen as, and for being, a member of the Parliament under article 102(1)(a) of the Constitution. This view, however, is open to doubt and cannot be relied upon.

5. However, attention in this connection is invited to the provisions of section 7(a) of the Representation of the People Act, 1951, which provides that a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament or/the Legislative Assembly or Council of a State if he is a director or managing agent of, or holds any office of profit under any corporation in which the appropriate Government has any share or financial interest. It would appear from the Housing Board Act, 1948, referred to above that the State Government has financial interest in the Board, which is a corporation under section 3 thereof. As stated in the above paragraph under rule 4 of the Bombay Housing Board Rules a member of the Board other than a Chairman is entitled to an allowance of Rs. 40/- every day of the meeting of the Board that he attends, and is therefore, a holder of an office of profit under corporation. The Advocate General's opinion No. 1 dated the 11th February 1952, (Copy attached) given with reference to the

question whether an M.L.A., can be appointed as a member of a State Road Transport Corporation, would apply to the facts of the present case and for the reasons stated in that opinion if an M.L.A., is appointed a member of the Bombay Housing Board he would be disqualified for being a member of the State Legislature under section 7(e) of the Representation of the People Act. The said section 7(e) is relatable to articles 102(1)(e) and 191(1)(e) of the Constitution under which Parliament alone is competent to enact a law. It would not, therefore, be possible for the State Legislature to remove the disqualification incurred thereunder.

Id/-
11/10.
Additional Secretary to Government.

M. (Labour and Health).

MSR.
27/6.